

5876

J. Carter
Proc I

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-139294

DATE: March 31, 1978

MATTER OF: Glover C. Hardin

DIGEST:

1. Contract for sale and demolition of surplus buildings excluded items of personal property and fixtures not firmly attached. Safe, mounted on wheels and not affixed to the property, was thereby excluded from sale. Claim by contractor for its value is denied.
2. Claim for payment for chain link fence and posts incident to sale of surplus buildings is denied where specific property descriptions fail to show that fence and posts were included in sale.
3. Claim for payment for property allegedly removed from surplus building sale site is denied where there is no evidence that removal of property was an authorized act of military personnel. Government is not liable for unauthorized acts of its agents.

Glover C. Hardin has requested reconsideration of a settlement issued on February 23, 1977, by the Claims Division of our Office which denied his claim for payment for materials removed from buildings purchased by Mr. Hardin under contract No. DACA41-7-71-541 issued by the Department of the Army. For the reasons stated below, we affirm that settlement.

Mr. Hardin was awarded the aforementioned contract on January 26, 1971, for the sale and removal of certain buildings and enclosed walkways from a mobilization hospital located at Fort Leonard Wood, Missouri. Subsequently Mr. Hardin claimed \$2,120 for materials allegedly removed from the buildings. The District Engineer denied Mr. Hardin's claim. Mr. Hardin appealed the District Engineer's determination to the Armed Services Board of Contract

B-189294

Appeals (ASBCA) which dismissed his appeal on June 25, 1973, on the basis that there was no clause in the contract by which the ASBCA might grant relief. Grover C. Hardin, ASBCA No. 17939. Mr. Hardin's claim was subsequently reconsidered and again denied by the District Engineer. The matter was forwarded to our Claims Division in March 1976.

Mr. Hardin's contract was for the sale and removal of 14 buildings and four sections of inter-connecting walkway. Mr. Hardin alleges that during the course of demolition and removal of these structures, the Army removed certain materials which rightfully were his and for which he is entitled to payment. The following specific items are claimed:

	Item	Amount Claimed
1	Steel Double-Door Safe	\$1,000
210	Feet of 2-Inch Steel Pipe	105
800	Square Feet of Acoustical Ceiling Tile	80
140	Feet of 9-Foot High Chain Link Fence, with 18 Posts	100
17	Windows from Ramp and Buildings	85
10	Doors Removed from Buildings	100
1	Hot Water Tank	20
210	Feet of 6-Inch Metal Parking Rails	210
3000	Board Feet of Lumber	<u>420</u>
	Total	\$2,120

B-189294

The Army concedes that it removed the safe and chain link fence, but contends that these two items were not included in the sale. With respect to the other materials, the Army states that Mr. Hardin has failed to demonstrate that the removal of materials was accomplished by the Department of the Army, as distinguished from Army personnel acting on their own.

The safe with which we are concerned here is described as being free standing, mounted on wheels, and approximately 2-feet thick by 5-feet wide by 6-1/2-feet high. The safe was lifted out by crane after Mr. Hardin had removed the roof and joists. The Army advises that removal of the safe was delayed until it could be lifted out because it was too heavy to be moved across the floor without damaging the structure; the safe previously had stood on a section of the floor which had been specially reinforced to withstand its weight.

The Army points to an unnumbered paragraph on the first page of the solicitation which states that: "This invitation does not include personal property, except fixtures firmly attached, unless specifically listed or identified herein," in support of its conclusion that the safe was not included in the sale. Mr. Hardin, however, points to the fact that the safe was still in the building and to paragraph 6a(8) of the contract, which stipulates that all usable items of installed property had been removed from the buildings, excepting certain items not relevant here, as evidence that the safe was included in the sale.

We are of the view that the question of whether the safe was a fixture or personalty is irrelevant in the present context. If the safe were personal property, then it clearly was excluded from the invitation and subsequent sale by the provision cited above by the Army. Alternatively, if the safe were a fixture, then it was within the power of the contracting parties to sever the safe and restore it to the condition of personalty through

B-189294

the terms of their contract. Dunvir v. Crowe, 9 S.W.2d 957, (Sup. Ct. Mo. 1928); Luhmann et al. v. Schaefer, 142 S.W.2d 1088 (Mo. App. 1940); Leawood National Bank of Kansas City v. City National Bank and Trust Company of Kansas City, 474 S.W.2d 641 (Mo. App. 1971). The safe was not "firmly attached" in any sense to the building in which it stood; it was free standing and mounted on wheels, neither was the safe listed as an item in the invitation. We think it clear, therefore, that the safe, even if considered a fixture, was excluded from the invitation by operation of the provision cited above by the Army. Consequently, we are of the view that the safe was not included in the invitation, regardless of its status as property.

Furthermore, we find no inconsistency between the foregoing analysis and subparagraph 6a(8) of the invitation. That portion of subparagraph 6a(8) to which Mr. Hardin refers states that "All usable items of installed property have been removed by the installation except the air compressors and the control valves used in connection with the operation of the sprinkler system which are not included in the sale." The word "install" generally means to set up or fix in position for use or service. See Black's Law Dictionary 939 (4th ed., Rev. 1968). But its use in connection with equipment implies something more than mere placement; it involves an element of attachment or assembly with a degree of permanence. See Wroblewski v. Grand Trunk Western Ry. Co., 276 N.E.2d 567 (Ind. App. 1972); J.C. Penny Co v. Holmes, 378 S.W.2d 105 (Tex. Civ. App. 1964); Smith v. Kappas, et al., 12 S.E.2d 693 (N.C. 1941); Long v. Ulmer Machinery Co., 246 P. 113 (Cal. App. 1926); De Merritt v. Forbes Milling Co., 216 P. 1086 (Kan. 1923); Paldanius v. Strauss, 198 P.253 (Or. 1921). The safe in question here was mobile, mounted on wheels, and was not in any way affixed or attached to the property with any degree of permanence. We are of the opinion that it was therefore not "installed property" within the meaning of this subparagraph.

B-189294

In view of the foregoing, we conclude that the safe was not included in the contract for sale.

Neither is this conclusion altered by the argument raised by Mr. Hardin that there was nothing in the contract to preclude him from hauling the building away intact. While Mr. Hardin may have been entitled to do so, and we do not address that question, we fail to see the relevance of the argument to the question of establishing ownership of the safe which is determined by whether or not the safe was included in the transfer of property.

We reach a similar conclusion regarding the chain link fence and posts to which Mr. Hardin claims entitlement. Items 2 and 4 in invitation for bids (IFB) No. DACA41-71-B-0090, which were the subject of Mr. Hardin's contract, very specifically describe the various buildings, connecting walkways and engineer facilities which were included in these items for sale. We find no mention of the chain link fence and posts and conclude that they were not included in the sale.

With regard to the balance of the items claimed by Mr. Hardin, he has furnished a number of affidavits tending to show that the items were removed by military personnel. No evidence is furnished, however, to establish that these acts were attributable to the Army, as distinct from the individuals acting on their own. It is a fundamental tenet that the Government is not responsible for the unauthorized acts of its agents. Federal Crop Insurance Corp. v. Merrill, 332 US 380 (1947). We find nothing in the record to persuade us that the alleged removal of these items of property was an authorized act of the military personnel in question. Consequently, we can ascertain no basis for holding the Army liable to Mr. Hardin for these items.

For the foregoing reasons, the claim is denied.

R. F. Keenan
Deputy Comptroller General
of the United States